Supreme Court, U.S.
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No. 85-938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD ROSS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED*

1. Whether the decision of the Illinois Appellate Court in this case is in direct conflict with the rule established in *California v. Trombetta*, 104 S.Ct. 2528 (1984), that the Due Process Clause requires the State to preserve evidence that it has reason to know is exculpatory and that the defendant has no opportunity to obtain independently, because the Appellate Court created a subjective good faith exception to that rule although the evidence established that:

   (a) In this purely circumstantial case, the police were well aware that suicide was a possibility and failed to follow their own procedures when they neglected to perform gunshot residue tests on the hands of either Betty Ross or the accused, Edward Ross;

   (b) The only explanation for the failure to test Betty Ross' hands was the erroneous conclusion of a rookie technician that her hands were contaminated; and,

   (c) The only explanation for the failure to test Edward Ross' hands was that Edward Ross had been removed to a hospital, but the same technician retrieved and preserved other evidence from the hospital.

2. Whether Edward Ross was denied Due Process of Law under *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), because the State improperly shifted to Edward Ross the burden of explaining the absence of evidence and the State neither disproved the reasonable hypothesis of suicide nor proved homicide beyond a reasonable doubt.

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* Petitioner is an individual and was the only defendant in the circuit court.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Edward Ross respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First Judicial District.

OPINIONS BELOW

The Illinois Supreme Court's Denial of Appeal as of Right and Leave to Appeal contained in Appendix A, below, at App. 1, is not reported. The opinion of the Illinois Appellate Court contained in Appendix B, below, at App. 2-14, is reported at 447 N.E.2d 1528 (1985). The

transcribed oral opinion of the trial court, contained in Appendix C, below, at App. 15-24, is not reported.[1]

JURISDICTION

The Illinois Supreme Court's Denial of Appeal as of Right and Leave to Appeal was entered on October 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] Record citations are to "R. ____." Appendices to this Petition are cited to the pages below numbered as "App. ____."

STATEMENT

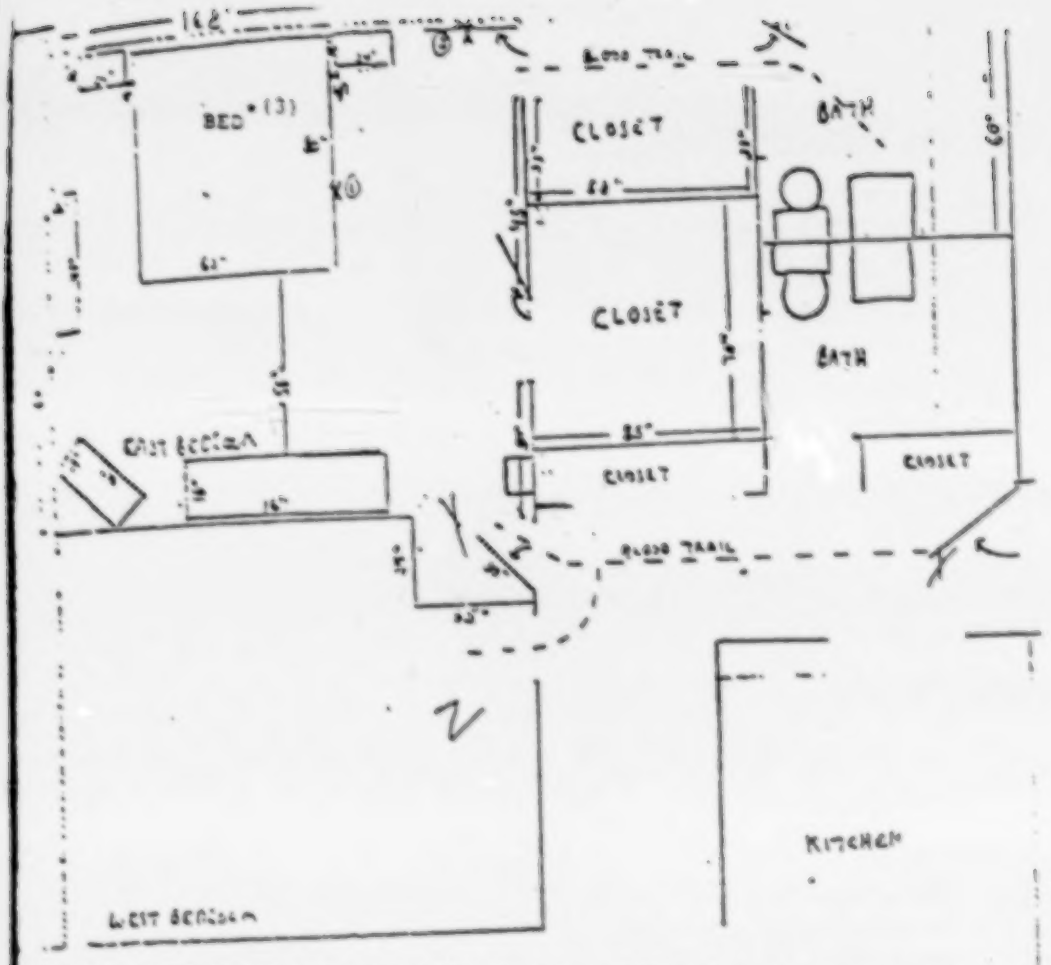
The Physical Evidence

A little after 9:00 A.M. on the morning of November 4, 1981, and as the trial court found, within minutes of the event, the police received a phone call from Edward Ross ("Ross") reporting a "shooting" at his apartment. (App. 17; R. 56-57.) When the police arrived with paramedics, Ross was kneeling over his ex-wife, Betty Ross ("Betty"), in his bedroom and attempting to administer oxygen. (R. 58, 84.) His first words were "help her, help her." (R. 58.)

Betty Ross had suffered a contact wound to her left temple. (R. 476-83.) She died later that day. (R. 1743.) The State's forensic pathologist who conducted her autopsy found the bullet wound was rightward, upward and backward. (R. 483.) It was the pathologist's opinion, that after being shot, Betty could have taken a step or moved about. (R. 492-94.)

Officer Winek was the first police officer to arrive on the scene. (R. 56-58.) He was also the only police officer to see the undisturbed evidence because he immediately handcuffed Ross and removed him to another room. At the same time, the two paramedics who accompanied Winek got to work on Betty. (R. 57-59.) They and their equipment substantially rearranged the evidence. (R. 602-603, 772-73.)

When Winek first entered the bedroom, Betty was lying on her back on the floor on the south side of the bed. (A diagram of the bedroom, an exhibit at trial, is reproduced at page 4, below.) Betty's head was toward the head of the bed and her feet toward the foot of the bed.



*/ The word "BED" has been added to the exhibit for the convenience of the court.

(1), (2) and (3) indicate places where bullets were found (R. 825). (3) was added to assist the court; (1) and (2) were original notations.

Job 17333 CR 33261
Death Investigation
04 Nov 81
9744 Dee Road Apt 302
Overall view of apt 302
not to scale

A revolver was on the floor between Betty and the bed, approximately two feet to Betty's right. (R. 57-59, 71-72, 87-89, 107.)

Although the paramedics were instructed not to disturb the bedroom (R. 588), they moved numerous objects, including Betty's purse which had a large amount of blood in it. The bloody purse was moved from the floor on the south side of the bed across the bed onto the north side of the bed. (R. 602-603, 772-73; P. Ex. 1; Supp. R. 1A.)

Quealy, the technician in charge, and his partner arrived approximately one-half hour later. Quealy was a novice who had been working as a technician for only five to six months. (R. 802-03, 870-871, 874-75.)

Quealy recovered Ross' H&R snub-nosed revolver from the scene. (R. 817, 821.) There was blood on both sides of the frame of the gun. (R. 822.) The gun was dusted for prints at the scene but Quealy was unable to recover prints or smudges. The gun was never sent for expert fingerprint examination in accordance with what Quealy testified were normal procedures. (R. 905-06.) Four bullets were recovered from the scene: one from the floor beneath the south side of the bed (R. 825); one from the carpeting near the east wall on the south side of the bed (R. 825); and one with reddish material on it from the surface of the bed just south of the middle of the bed and approximately two-thirds towards the top of the bed (R. 835-36, 915; Def. Ex. 11) (these three bullets are marked on the diagram at page 4 as numbers 1, 2 and 3); the last bullet was recovered from Betty's head. (R. 497-99, P. Ex. 12.) All four bullets had been fired from Ross' gun which was kept loaded in the drawer of his nightstand on the north side of the bed. (R. 1000-01.)

There was a bloodstain on the bed starting from the spot where the bullet was found and running to the south edge of the bed. (Supp. R. 2.) There were bloodstains in many other places in the bedroom, particularly on the south side of the bed. (R. 773, 838-39, Supp. R. 2, Supp. R. 26.) The bloodstain samples were taken on cotton swabs by Quealy. Another State's expert later testified that this was not the best means of collection. (R. 1112.) The whole bedsheet and the pillow cases were not retained by the police, although a portion around the bloodstain was retained. (R. 859-60.)

Quealy testified that when only two people are present at the scene of a shooting, it is normal procedure to preserve samples for gunshot residue tests. (R. 935-36.) Quealy knew the necessary procedures and had the equipment. Nevertheless, Quealy did not preserve evidence from either Betty's or Ross' hands in order to perform neutron activation or atomic absorption tests for gunshot residue. (R. 928-31.)

Quealy testified that he failed to take the necessary samples because he believed that Betty's hands were contaminated by contact with the carpeting and by the adhesive tape put on them by the paramedics to give her intravenous fluids. (R. 936-38, 951; Def. Ex. 16; Supp. R. 41.) However, defense expert, Emmett Harmon, gave unrebutted testimony that there can be no contamination of the barium and antimony metals which are the gunshot residue from contact with carpeting or adhesive tape (R. 1407), and that neither fact would have affected the outcome of the test. (R. 1356-60.)

Quealy's only explanation for failing to test Ross' hands was that Ross had been taken by the police to the hospital. (R. 935-38.) However, the evidence established that

Quealy went to the hospital to retrieve other evidence for testing and that he obtained Ross' pajama bottoms there. (R. 868.) In addition, the police officer in charge of the investigation gave no explanation for his failure to give Quealy orders to preserve the necessary samples for gunshot residue testing. (R. 632-34.)

Ross' Testimony Relating To Betty's Death

Edward Ross testified at his trial and unequivocally denied shooting Betty. (R. 1575.)

In 1981, Edward Ross was 49 years old, Betty was 47. (R. 472, 1579.) Ross had four children by his first marriage. Ross had married Betty in 1973. In 1977, they were divorced but remarried after one month. They were divorced again in 1978. (R. 1594-95.) Betty also had four children by a prior marriage. Difficulties between the two groups of children had been a major cause of the divorces. (R. 1504-05.) After their second divorce, they continued to see each other and to have a sexual relationship. (R. 1505.)

On October 3, 1981, Betty and Ross had an argument and did not speak to each other for a little over two weeks. On October 20, they resolved their argument and discussed the future of their relationship. (R. 1522-26.) On October 23, Ross drove Betty to the airport for a business trip she had planned in San Francisco. While Betty was in San Francisco, they telephoned each other frequently, and Betty told Ross that she wanted to remarry. (R. 1523-33.)

When Betty left San Francisco, she travelled to Las Vegas for a short pleasure trip with her daughter, Jana Nuter. (R. 1533.) Betty called Ross and had him meet her at O'Hare Airport when she returned to Chicago early

on the morning of November 4, 1981. Ross suggested that Betty return to her own home, but Betty wanted to talk about their relationship and about remarriage. At Betty's request, Ross drove her to his apartment in Des Plaines, Illinois. (R. 1537-39.)

At Ross' apartment, they ate, Betty bathed, and they went to bed. Betty lay on the south side of the bed. In bed, they talked and had sexual intercourse. (The forensic evidence confirmed that Betty had engaged in consensual intercourse before her death, R. 1673.) The room was in total darkness, Betty again asked what they would do with the rest of their lives. Ross responded: "[w]e have to see your mother at noon. We have to drive tomorrow to Traverse City [where Betty's son was to be arraigned on a felony charge]. I am going to sleep." (R. 1545.)

Ross went to the bathroom in the hallway to wash. He put on his pajamas and returned to lay down on the north side of the bed. (R. 1545-47.) He heard an explosion. (R. 1630.) He rolled off the bed to his left, the south side of the bed, and ran out into the hallway. He heard another explosion. He called out Betty's name—and then returned to the bedroom, turned on the closet light, and found Betty on the floor on the south side of the bed with a gunshot wound to her head. Ross got an oxygen tank from the north side of the bed and placed the mask on Betty's face.

The trial court found that the shooting took place at 9:00 A.M. (App. 17.) Within minutes, Ross telephoned the operator for help (R. 56-57), opened the front door so people could get in, and returned to administer first aid. Ross continuously stated his concern for Betty once the police arrived. (R. 132-33, 152-53.)

It was not until the police arrived that Ross realized he had been wounded on the inside of his upper right thigh. (R. 63, 78-82, 107-08, 1640.) When Ross was taken to a hospital for treatment, emergency personnel were concerned that an artery or vein in the leg had been damaged. (R. 115-21.) The entry wound was on the upper part of Ross' front inner right thigh approximately 8 inches above the knee and one inch in from the midline of the leg. The entry wound was 1-1/2 to 2 inches higher than the exit wound. (R. 1497-1500.) The State's expert testified that the wound was not a contact wound and the shot had been fired less than 6 inches from Ross' pajamas. The bullet had passed through the thigh. (R. 1012.)

Until Ross was told of Betty's death, he frequently asked about her condition and refused to say she had shot him. He repeatedly and consistently denied that he had shot her. (R. 62-63, 563-64.) Only when Ross was informed of Betty's death did he say that Betty had shot herself. (R. 1743-44.)

Betty's State Of Mind

The evidence established that the summer before her death, Betty Ross had experienced severe emotional problems. Starting in June 1981, she had taken leave from work to be treated by a psychiatrist *every day for four to six weeks for eight hours per day.* (R. 1205.) At the same time, she told a co-worker that she was falling apart, and could not concentrate or think straight. (R. 717-19.) Her psychiatrist prescribed thyroid medication, vitamins, and minerals, changed her diet, and prohibited smoking, and Betty's condition improved. (R. 1203-04.) However, there was unrebutted testimony by her co-worker and Ross that by October 1981, Betty had resumed her old

dietary habits as well as smoking and that she had ceased taking her medicine. (R. 720-22, 745-46, 1511-12.)

Betty was also in debt. (R. 1514, 1534-35, 1665-67.) She was worried about the health of her parents—her mother faced major surgery for breast cancer and her father was also going to have surgery. Her son had been arrested on a felony charge for grand theft and was to be arraigned in Michigan on November 6, 1981. (R. 1521-22.)

On November 4, Betty returned to Ross' apartment. Saying, "this is how I feel" (R. 1542, 1650-51), she gave him a 3x5 card with a poem by John Berryman on it which said, in part, "I don't think I will sing any more just now, or ever." (R. 1542, 1650-51, Def. Ex. 4; Supp. R. 35.) Betty also gave Ross two greeting cards, one saying "Life is so short we ought to be together you and I" and the other "no matter where I look I see you." (R. 1542-43; Supp. R. 36, 37.) On November 4, after they had made love, Ross rebuffed Betty's efforts to talk about remarriage. (R. 1545.)

The Theory Of The State's Case

The State put on evidence which was intended to establish that Betty would not have committed suicide with a gun. Betty's daughter, Jana Nuter, testified that Betty had lost the ring finger on her left hand eight years earlier in an accident and that Betty performed no activities with her left hand. (R. 203-04.) However, on cross-examination, Jana testified that as a typist, Betty used both hands and also played the piano. (R. 273, 320.) Jana also testified that Betty was afraid of guns. (R. 198-202.) However, during their marriage Betty allowed Ross to store guns in their home, bought him a gun, and accompanied him to trapshoots. (R. 272, 259-63, 1304-12, 1459-62.)

It was also brought out that Jana and her siblings had a pending lawsuit against Ross. (R. 243-45.)

The State argued that Betty, who was right-handed and missing the ring finger of her left hand, could not have shot herself with her left hand. (R. 1841-42.) The State's witness on this point, Dr. Choi, testified only that he could reach no definite conclusion about whether the wound was self-inflicted. (R. 539.)

The only expert evidence on this point was put in by the defense. Joseph Dwayne Nicol, Professor of Criminal Justice at the University of Illinois and former director of the Illinois Department of Law Enforcement Crime Laboratory (R. 1468-69), testified that no definite opinion about the likelihood of suicide could be reached on the basis of the location of a gunshot wound because right-handed people will shoot themselves in the left side of the head. (R. 1473.) Professor Nicol referred to a specific study involving suicide cases which showed that eight percent of righthanded suicides suffered a gunshot to the left temple. The authors of the study had stated that no conclusion could be reached as to whether or not a gunshot was suicidal based solely upon the handedness of the deceased. (R. 1481.) Professor Nicol testified that in his opinion it was not suspicious to find a wound site on the opposite side of the head from a shooting victim's handedness. (R. 1484-86.)

The State also argued that Ross had admitted killing Betty to Betty's former husband, George Nuter, during a heated argument over burial arrangements by saying "I know. I know" in response to Nuter's accusations. (R. 648.)

The prosecutor argued that Ross shot himself in the leg while sitting on the bed. (R. 1832.) To support its argu-

ment of cover-up, the prosecutor also argued that the fact that Ross reported hearing two "explosions" was suspicious in light of the fact that Ross was an experienced trapshooter and in light of the fact that there were four shots. (R. 1763, 1777.)

The State made no attempt whatsoever to put on evidence supporting any version of the physical events surrounding the shooting and never made any effort to explain the two shots that Ross had not heard or why he would fail to report hearing four shots. It never established which bullet went through Ross' leg and never tested or explained the red stain on the bullet found in the middle of the bed. (R. 1101.)

The State's witnesses testified that Betty was happy when she was in San Francisco. (R. 215, 685.) The State also put into evidence a letter dated October 23, after Betty and Ross had resolved their October argument, saying that although her mother had breast cancer, her father was scheduled for surgery, and Betty had herself been ill a few months ago, she felt better and was in an optimistic mood. (Supp. R. 7.) The State also submitted a letter dated October 5, just after the October 3 argument and before they had made up, saying that "we are hopelessly out of sync" and that Betty found Ross' talk and behavior offensive. The State also introduced a letter from Ross to Betty dated October 10, 1981, before the fight was resolved saying "you are killing me with your distance." (Supp. R. 9.)

Although the prosecutor acknowledged that Betty and Ross had engaged in a consensual sexual act, which he said was a "confusing element" (R. 1828), he argued that Ross' motive was a spurned desire that Betty return to him. (R. 1767-69.)

The Trial Court's Decision

Ross was tried before the bench. The trial judge acknowledged that this was a purely circumstantial case. (App. 16.) In so stating and in making no reference to George Nuter's testimony, the trial court apparently discredited the testimony of Betty's ex-husband. The trial court credited much of Ross' testimony relating to the events of November 4. (App. 17.) However, the trial judge adopted a specific theory of the case which had never been argued by the State or supported by expert evidence. The trial judge based his ruling primarily upon his own theory of the bloodstain in the southeast area of the bedsheet. Despite the fact that the State had not argued or presented evidence on where or how the shooting took place, the judge ruled that the size and placement of this single bloodstain in a room filled with bloodstains, established that Betty had been shot on the bed:

> I believe from these facts it [can] be concluded beyond a reasonable doubt that Betty Ross bled on the bed; that that is where she was shot, and that she was then slid, pulled off, or pushed off the bed onto the floor where she lay when the investigating officer and paramedics arrived. (App. 18.)
>
> * * * *
>
> This blood that I have just described would not be there if Betty Ross shot while standing on the floor of the south side of the bed as the defense theory postulates. (App. 21.)

The judge stated that Ross' version, in which he moved across the bed to the left or south side without contacting Betty, required Betty to have shot Ross in the leg while she was on the north side of the bed or leaning over the south side of the bed. (App. 19.) He rejected these theories, stating without further explanation that: "None of these theories . . . account for the relatively large

bloodstain on the sheet on the south side of the bed towards the head." (App. 20.) In addition, the trial judge found that "the wound to the Defendant's right thigh is more consistent with a self-inflicted wound than with any reasonable theory which Betty Ross might have inflicted the wound." (App. 21.)

The trial judge also noted that no prints were found on the gun. (App. 20.) He found that there was a "greater than not likelihood that a person committing suicide would not shoot themselves on the opposite side of their head from their handedness." (App. 20.)

Count I of the indictment alleged that Ross intentionally and knowingly shot and killed Betty Ross with a gun without lawful justification. (Ill. Rev. Stat. Ch. 38 § 9-1 (a)(1) (1979).) Count II alleged that Ross shot and killed Betty Ross with a gun, knowing that the shooting created a strong probability of death or great bodily harm, without lawful justification. (Ill. Rev. Stat. Ch. 38 § 9-1(a)(2) (1979).) (R. 1861.)

On July 5, 1983, Judge Lester A. Bonaguro found Ross not guilty on Count I and guilty on Count II and sentenced him to 30 years imprisonment. (R. 1861-62.) Ross is now imprisoned.

The Appellate Court's Decision

Although the parties had devoted a substantial portion of the briefs to arguing the application of *California v. Trombetta*, 104 S.Ct. 2528 (1984), to the State's failure to preserve the gunshot residue samples—the only direct evidence in this case—the Appellate Court did not even cite *Trombetta*. It dealt with this issue by acknowledging the State's duty to preserve evidence, but ruled that the failure to take gunshot residue tests in this case did

not deny Ross Due Process because Officer Quealy "believed" that reliable samples could not be obtained. (App. 5.) The court made no separate reference to the failure to obtain samples from Ross at the hospital.

The Appellate Court relied upon: (1) George Nuter's evidence, despite the trial judge's failure to rely upon it (App. 12-13); (2) the fact that Ross was a trapshooter, yet described the gunshots he heard in the bedroom as "explosions" (App. 11, 13); (3) that Betty had been in an optimistic mood prior to her death (App. 14); (4) that, as the trial court had found, the bloodstain on the bed established Betty was shot on the bed (App. 13); (5) that since Betty was shot on the bed the placement of the three bullets found in the bedroom was inconsistent with the argument that the shots had been the typical "hesitation" shots of a suicide (App. 11-13); and (6) that it was unlikely that Betty, who was afraid of guns, right handed, and missing a finger on her left hand, would have used her left hand to shoot herself in the left side of the head. (App. 12-13.) The Appellate Court also specifically relied upon the absence of fingerprints on the gun to conclude that the gun had been wiped. (App. 13.) In addition, the Court stated that the "trial court's finding that the characteristics of [Ross'] wound were more consistent with self-infliction than with infliction at the hand of another was not, in our opinion, unjustified, although no expert testimony was elicited regarding this question." (App. 13.) Finally, the Court said "the evidence in the instant case is clearly more consistent with murder than with defendant's theory of suicide." (App. 13.)

The Petition For Rehearing

Ross petitioned for rehearing specifically bringing to the Appellate Court's attention the failure to cite *Trombet-*

ta. The petition also pointed out that many facts were omitted from the Appellate Court decision and that: (1) the conclusions based on the bloodstained bedsheet were invalid because the blood could have been Ross', could have come from the bloody purse or, as the forensic pathologists had testified, Betty could have fallen onto the bed after shooting herself; (2) the bullet placement was consistent with hesitation shots if Betty was standing on the south side of the bed where most of the bloodstains were found; (3) Betty could have used both hands holding them around the back of the handle of the gun and pressing the trigger with one or both thumbs and that this stance was not in any way inconsistent with a shot to the left temple; and (4) it is scientifically invalid to conclude that a gun has been wiped clean when a technician fails to find fingerprint evidence. Supplemental expert affidavits on this point were submitted and accepted by the court. (Appendix D, App. 25.) Rehearing was denied.

On October 2, 1985, the Illinois Supreme Court denied leave to appeal.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW WILL EVISCERATE THE RULE ESTABLISHED BY THIS COURT IN *CALIFORNIA v. TROMBETTA* THAT THE STATE MUST PRESERVE MATERIAL AND EXCULPATORY EVIDENCE.

This Court recently recognized that the states violate the Due Process Clause of the Fourteenth Amendment if they fail to preserve evidence at the investigatory stage which has an apparent exculpatory value and if the defendant is unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta*, 104 S.Ct. 2528, 2534 (1984).

The facts in Edward Ross' case could not more completely conform to the requisites for applying the rule. From the inception of the investigation, the police knew that the claim of suicide would be raised and that the only possible causes of death were accident, homicide or suicide. The evidence of gunshot residue was crucial to the question of Ross' guilt or innocence and would have been the only direct evidence in this circumstantial case.

The gunshot residue tests had a clear exculpatory value and could not have been obtained by Ross in any other way. As a general matter, the value of a gunshot residue test in cases like this is so obvious that it is a matter of routine police practice to preserve the necessary samples, as technician Quealy testified. (R. 934-36.) He conceded that he violated that procedure when he failed to test Betty's and Ross' hands for gunshot residue. (*Id.*)

The officer in charge of the investigation, Officer Kraut, did not order t[illegible].[2]

The ruling of the Illinois Appellate Court was that when Mr. Quealy decided to ignore the evidence on Betty's hands, he acted with subjective good faith. (App. 5.) The decision does not address the fact that uncontested record evidence established that Quealy was wrong to believe Betty's hands were contaminated. Moreover, the ruling in no way addresses Quealy's grossly negligent and unexplained failure to test Ross' hands when he went to the hospital to retrieve Ross' pajama bottoms. (R. 868.)

In any case, when the Appellate Court ruled that Quealy's excuse for his failure to preserve this crucial evidence was sufficient to create an exception to *Trombetta*, the court established an exception which will eviscerate the rule. Such an exception was rejected in *Trombetta* itself, when this Court set out an objective constitutional standard for evaluating the duty to preserve evidence:

> More importantly [than good faith or observing normal practices] California's policy of not preserving breath samples is without constitutional defect. Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S. [97] at 109-110, 96 S.Ct. at 2400, [1976], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

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[2] Ross asserted at trial, and on appeal, that there is record evidence that Kraut had an animus toward Ross. (Appellant Br. 68-69; R. 1250, 1253-64, 1266-67, 1554.)

104 S.Ct. at 2534. Although the Court in *Trombetta* notes the absence of allegations of police animus, bad faith, or failure to follow procedures, its citation to *Agurs* is to the very pages in which the *Agurs* Court specifically rejected a good faith test: "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." *United States v. Agurs*, 427 U.S. 97, 110 (1976) (footnote omitted).

In this case, Quealy knew the evidence was of signal importance but consciously violated police procedures when he determined not to test Betty's hands. His subjective belief, based on negligible experience, was unreasonable and wrong. The defense expert gave unrebutted testimony that neither the contact with the carpet nor the adhesive tape could have interfered with the testing for metal particles of barium and antimony. (R. 927-29, 1357-60, 1407.) Indeed, Quealy conceded that the photograph of Betty's left hand did not show tape on the portion of the hand to be tested (R. 937-38); and there was no tape on Betty's right hand, which would have had residue on it if Betty shot herself with both hands.

Moreover, the Appellate Court completely ignored the fact that Quealy had no excuse for his failure to test Ross' hands. Ross was in police custody from the time the police entered the apartment. Quealy chose not to obtain the gunshot residue samples at the hospital despite the fact that he collected Ross' pajamas there and could have performed the tests on Ross. (R. 868.) At best, this is a case of extreme neglect by an inexperienced technician. The *Trombetta* decision specifically incorporated within its rule

"evidence destroyed through prosecutorial neglect or oversight." 104 S.Ct. at 2533.[3]

The exception established by the Illinois Appellate Court would invariably permit the state to ignore the *Trombetta* rule and then to explain its failure to preserve evidence by having police testify that they did not "believe" the evidence to be valuable. It would leave defendants unprotected from gross neglect and even animus; unreasonable and unfounded beliefs would form an adequate excuse for failing to observe the *Trombetta* rule. Permitting such an exception would eviscerate the rule. Any good faith exception to the *Trombetta* rule must be an objective test and must turn on the showing of an "earnest effort" and the observation of normal police procedures.

The Court of Appeals for the District of Columbia adopted precisely this objective good faith test in *United States v. Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1979). The *Bryant* court held that the measure of good faith is whether the police made an earnest effort to preserve the evidence and observed normal procedures.

Quealy's failure to get samples from Ross at the hospital or from Betty's right hand was inexcusable and not an earnest effort. Indeed, Quealy's negligence as well as Kraut's animus is evidence of bad faith. Quealy's judgment regarding Betty's left hand was wrong. His failure to collect any of the samples was, according to his own testimony, a violation of established procedure. (R. 935-36.)

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[3] See also *State v. Wright*, 87 Wash. 2d 783, 557 P.2d 1 (1976), where the state had permitted destruction of evidence it had failed to collect, the Washington Supreme Court reversed a conviction without finding bad faith.

The question which should have been posed by the Illinois Appellate Court was whether the evidence was material—whether its "exculpatory value" was apparent before it was destroyed. *Trombetta* acknowledges that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose content is unknown and, very often, disputed." 104 S.Ct. 2533. In *Trombetta*, the Court held the breath samples for the Intoxilyzer tests were not potentially exculpatory because they had already been tested and found to be inculpatory, and the defendants had means for challenging the tests. They did not need the breath samples to impeach the test. Here, the samples were never tested and they would have been direct, not impeachment, evidence of guilt or innocence. *Trombetta* does not impose the illogical requirement that the defendant prove with certainty that evidence which was never tested and is no longer available was exculpatory. *Trombetta* specifically states that the state must preserve "evidence that *might* be expected to play a significant role in the suspect's defense." 104 S.Ct. at 2534. (Emphasis supplied.)

No evidence could have been more likely to play a significant role in Ross' defense than the evidence of gunshot residue. This crucial evidence could not have been obtained by Ross by any other means. This evidence is squarely within the *Trombetta* rule. The Illinois Appellate Court's ruling abrogates *Trombetta* and means that the State can freely decide to ignore evidence which has apparent exculpatory value. Under the Illinois Appellate Court's decision, there will be no need to observe this Court's rule in *Trombetta* that the state has "a duty to take affirmative steps to preserve evidence." 104 S.Ct. at 2533. The result of the Illinois Appellate Court's ruling

was a gross injustice, the affirmance of an insupportable conviction in a case in which Due Process was denied.

Because the exception created to the *Trombetta* rule will jeopardize the fairness of numerous criminal trials and bears particularly on the police practice of taking gunshot residue tests in homicide cases, review by this Court is warranted.

II.

THE APPELLATE COURT'S DECISION IMPROPERLY PLACED THE BURDEN OF EXPLAINING EQUIVOCAL EVIDENCE UPON ROSS IN VIOLATION OF THE RULE OF *IN RE WINSHIP* AND *MULLANEY v. WILBUR* WHICH REQUIRES PROOF BEYOND A REASONABLE DOUBT.

The circumstantial evidence in this case was entirely consistent with the defense theory that Betty Ross committed suicide. Betty was emotionally disturbed. She had taken leave of her work to engage in extraordinarily extensive psychotherapy for eight-hour days for four to six weeks only months before her death. (R. 1205.) Her mother and father were ill. Her son was charged with a felony. (R. 1521-22.) She returned from a three week business trip, not to her children, but to Ross. She engaged in consensual intercourse with him and afterward he rebuffed her renewed interest in remarriage. (R. 1545.)

After they made love, while Ross was in the bathroom, Betty took the gun from his night table drawer. Ross returned to bed in the room darkened by blackout shades. While she stood either at the southeast side of the bed or on the north side of the bed, she fired the first shot which Ross described as an explosion. Stunned, Ross rolled off the bed. As he was rolling or stood up, a sec-

ond shot was fired. He did not hear this shot in his confusion and panic or because he was temporarily deafened. The first or second shot hit him in the leg. Ross ran out to the hallway, heard a third shot, paused and called out. Holding the gun in both hands, Betty then shot herself, as she was standing next to the bed on the south side. She fell directly onto the bed or took a step or two and fell onto the bed and slipped to the floor.[4] In the hallway, Ross did not hear the last shot because the gun was in contact with Betty's head.

This theory is consistent with all of the evidence including the following: (1) the State's own pathologist testified that Betty's wound was consistent with a suicide wound (R. 539); (2) Betty did not have restricted use of her left hand (R. 273, 320); (3) the reasonable hypothesis of suicide cannot be negated because there is a wound on the opposite side of handedness (R. 1473) and because Betty could have shot herself with both hands; (4) Betty gave Ross two maudlin cards and a depressing poem, saying "this is how I feel"; and (5) Ross called for help immediately, administered first aid, and refused to accuse her of shooting him or herself. (R. 56-58, 84, 1556, 1640.) In addition, the failure of the state to preserve the gunshot residue in itself raises a reasonable doubt of guilt.

As Ross argued below, the discovery of several bullets is consistent with a recognized phenomenon in suicide cases and is frequently the source of mistaken analysis of a death. In L. Snyder, *Homicide Investigation*, 141-42 (Charles C. Thomas, 2d ed. 1967), the author points out that the presence of "hesitation shots" is sometimes the

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[4] It is also possible that the bloodstain on the bed resulted from the bloody purse and not directly from Betty.

source of police confusion. When there are multiple shots discharged and only one in the victim, "these are usually suicide. . . . The extra shots *hesitation shots.*" When the victim "points the gun at his head, [he] subconsciously pulls away from it at the moment of discharge, with the result that the bullet misses him completely. This may be repeated two or three times before he finally turns the gun directly upon himself and fires." (Emphasis in original.) The facts in this case are also consistent with Snyder's observation that "a period of survival favors suicide as the cause of death" because a murderer is likely to fire several bullets into the victim to make sure that he is dead while a suicide frequently survives for a period of time. L. Snyder at 137.[5]

The Illinois Appellate Court rejected the notion of hesitation shots in this case only because it assumed that Betty had been lying in bed prior to the fatal shot. (App. 12.) The finding that Betty was shot while lying in bed was made by the trial court without any basis. The State never even postulated that the prolific bloodstain evidence could demonstrate the location of the shooting, particularly in light of the paramedics' interference. By relying on this evidence, upon the absence of fingerprints on the gun, upon the wound in Ross' leg, upon the reference to "explosion," and upon Betty's right handedness, the trial court and the Appellate Court improperly shifted the

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[5] Snyder has been recognized as an expert by the Illinois Supreme Court in *People v. Garrett*, 62 Ill. 2d 151, 339 N.E.2d 753 (1975). In that case, a murder conviction was reversed because suicide was not disproved. The court relied in part on the statement in Snyder's book that when "the muzzle of a gun is pressed tightly against the skin, little or no noise from the blast may be produced." L. Snyder at 144. This phenomenon played a part in Ross' case as well and probably accounts for Ross' failure to hear the last gun shot in this case.

burden of explanation for the failure of proof to the defendant, Ross.

This shift in the burden of proof is confirmed by both courts' language describing their holdings.

The trial judge found that the "wound to Defendant's right thigh is more consistent with a self-inflicted wound than with any reasonable theory which Betty Ross might have inflicted the wound." (App. 21.) The trial court also found a "greater than not likelihood that a person committing suicide would not shoot themselves on the opposite side of their head from handedness." (App. 20.)

The Appellate Court upheld the trial court's finding that the characteristics of Ross' wound were "more consistent with self-infliction than with infliction at the hand of another . . . although no expert testimony was elicited regarding this question." (App. 13.) It also stated that the "evidence in the instant case is clearly more consistent with murder than with defendant's theory of suicide." (App. 13.)

The facts in this case were entirely consistent with suicide. Without improperly shifting the burden of explaining the State's failure of proof to Ross, no rational trier of fact could have found Ross guilty beyond a reasonable doubt.

In *In re Winship*, 397 U.S. 358, 364 (1970), this Court held "[l]est there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged.*" (Emphasis supplied.) *Winship* recognized that the American scheme of criminal procedure puts the defendant at a severe disadvantage

and threatens his most transcendant interests—his liberty and reputation. Therefore, the reasonable doubt standard plays a critical role in reducing the risk that convictions will rest on factual error. *Id.* at 363. *Winship* establishes that the burden on the state is to prove its case; it may not shift the burden of disproving guilt to the defendant.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court applied *Winship* to reverse a murder conviction because the jury was permitted to presume malice aforethought from the fact that the homicide was both intentional and unlawful. The defendant had the burden of rebutting the presumption by showing passion and sudden provocation by a preponderance of the evidence. In *Mullaney*, there was an absence of evidence on the issue of malice aforethought, an issue singularly within the knowledge of the defendant. But the Court specifically stated that that problem did not justify shifting the burden of proof. 421 U.S. at 702.

In *Clark v. Procunier*, 755 F.2d 394 (5th Cir. 1985), the court applied *Winship* to reverse a conviction based upon logical inferences significantly more cogent than the reasoning of the Illinois courts in this case. Clark was convicted of burglary, which required that the state prove breaking and entering into a building. The state supported the jury's guilty finding by pointing to inspection stickers found on the defendant that had been contained in a safe and Clark's palm print found on the safe. The safe was partially inside and partially outside the building. The court held that at most this evidence proved theft; it did not prove that Clark broke into the building. The state argued that Clark's failure to offer a rational non-criminal reason for his palm print removed any reasonable doubt. Citing *Winship*, the court rejected this thesis because it "relieves the State of its burden of proving beyond a rea-

sonable doubt 'every fact necessary to constitute' the crime with which Clark was charged." 755 F.2d at 396. The lack of fingerprint evidence in this case is even less significant than the palm print in *Clark* but was similarly misused by the trial court to reach a faulty conclusion.

Like the *Clark* trial court, the Illinois courts violated the dictates of *Winship* and *Mullaney* when they shifted to Ross the burden of explaining the State's failure of proof in this case. The trial court and the Illinois Appellate Court made inferences that had no logical or scientific nexus with the proved facts. The logical conclusions were so attenuated from the evidence that Due Process was denied.

The best example of this process of illogic was the misuse of the State's evidence that Quealy had failed to recover fingerprint evidence. Despite the fact that not one iota of expert testimony was put in to support the State's argument relating to this fact, the Illinois Appellate Court relied on the absence of prints to conclude that the gun had been wiped clean, and that only Ross could have done that. (App. 13.) This was a significant factor in the court's affirmance. (*Id.*) This conclusion was a scientific conclusion which required proof by the State; but the State provided no evidence on this point because it could not do so. The leading experts in the field state categorically that *it is scientifically invalid to conclude that a handgun has been wiped clean when a technician fails to recover any fingerprint evidence.* (App. 26, Affidavit of Robert D. Olsen, Sr., author of the leading text *Scott's Fingerprint Mechanics* (2d ed. 1978).) Fingerprints are recoverable from handguns only in a small minority of cases. (App. 28, Affidavit of David Lee Grieve.)

The trial court concluded that it was "more likely" that Ross inflicted the wound in his thigh than that Betty did. The State had argued Ross inflicted the wound while sitting on the bed. (R. 1832.) But that is inconsistent with the physical evidence. The entry wound was on the upper part of Ross' inner right thigh. The exit wound was 1-1/2 to 2 inches lower. (R. 1497-1508). In order to achieve that angle, Ross, who is right-handed, would have had to hold the gun in his groin. Furthermore, the bullet with the red stain never tested by police was lying in the middle of the bed at the end of a bloodstain. The State never argued that the placement of the other two bullets was consistent with its theory of a self-inflicted wound. In addition, the Appellate Court was wrong in stating there were no major arteries where the bullet went through. (R. 115-21.) The State's own witness testified that medical personnel at the hospital believed an artery might have been severed by the bullet. (R. 115-21.) Moreover, when the police arrived, Ross was administering first aid in apparent ignorance of his own injury. (R. 58.) Finally, this entire unsupported cover-up theory does not prove homicide beyond a reasonable doubt.

The bloodstain on the bed thesis (App. 13) is another instance in which the Illinois courts shifted the burden of explanation to Ross. The State had never even argued that Betty was shot in bed. There was no scientific evidence supporting that theory and no residue testing had been done on the sheets and pillow cases. Moreover, the bloodstain itself was consistent with Betty falling on the bed after she was shot. Yet, without notice, the trial court reached out for this conclusion and placed on Ross the burden of countering an unsupported theory of the events which in any case does not prove homicide beyond a reasonable doubt.

The Appellate Court also concluded that because Ross reported the gunshots as "explosions," he must have been fabricating. We utterly fail to see why the sudden unexpected noise of handgun shots indoors must necessarily relate to Ross' trapshooting experience with a shotgun out-of-doors, as the Court postulated. (App. 11.) But, in any case, this conclusion has no logical nexus with the finding of guilt. If Ross had fired the gun he would have no reason to lie about the sounds and he would have had the sense to state that four bullets had been fired.

There are reasonable innocent explanations for each item of evidence in this case. A rational trier of fact could not have found that murder was proved beyond a reasonable doubt unless it improperly shifted the burden of proof. The fact that it did improperly shift the burden is also demonstrated by the trial court's statement that there was a "greater than not likelihood" that a person committing suicide would not shoot himself (or herself) on the opposite side from handedness. (App. 20, emphasis supplied.) In fact, this reliance on handedness is the sole basis for the finding of guilt in this case. A greater than not probability is not proof beyond a reasonable doubt; it is not a sufficient basis upon which to deprive a man of his liberty.

The fundamental fairness required by *Winship* and *Mullaney* was denied both by the trial court and by the Illinois Appellate Court; Ross was improperly condemned to serve a 30-year sentence.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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November 29, 1985

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APPENDIX A

(Letterhead of)
ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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October 2, 1985

Mr. Thomas P. Sullivan
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No. 62070—People State of Illinois, respondent, v. Edward Ross, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal as a matter of right in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 23, 1985.

APPENDIX B

83-2478

Second Division
March 12, 1985

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

EDWARD ROSS,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Lester A. Bonaguro, Judge Presiding

PRESIDING JUSTICE STAMOS delivered the opinion of the court:

Defendant Edward Ross was convicted of murder in a bench trial after the November 4, 1981, shooting of his ex-wife Betty and was sentenced to 30 years' imprisonment. Defendant appeals his conviction.

In 1981, defendant was 49-years-old and his ex-wife Betty was 47-years-old. Defendant and his ex-wife were twice divorced, having been married in 1973, divorced and remarried in 1977 and divorced again in 1978. They continued to see each other frequently after the second divorce.

In October of 1981, Betty traveled to San Francisco on business, stopping on the way back in Las Vegas, where she met Jana Nuter, her daughter by a previous marriage. Betty returned to Chicago on the morning of November

4, and was met at the airport by defendant, who drove her to his apartment in Des Plaines, Illinois. After arriving from the airport, Betty and defendant ate and went to bed, where they talked and engaged in sexual intercourse. Defendant testified that he got out of bed and went to the bathroom to put on his pajamas, the bedroom being completely dark. He returned to the bedroom and lay down on the bed. As he lay awake, he heard an "explosion" and rolled across Betty's side of the bed and ran into the hallway, where he heard another explosion. He returned to the bedroom, turned on a closet light and saw Betty lying near the bed with a gunshot wound in her head. Defendant took an oxygen tank from his side of the bed and placed the mask on Betty's face. He then telephoned for help and opened the apartment door.

Officer Winek of the Cook County Sheriff's Police testified that on November 4, 1981, between 9:00 and 9:08 a.m. the sheriff's office in Des Plaines received a telephone call reporting a shooting at defendant's apartment. Officer Winek, his partner Bryant and three paramedics went to the apartment, where they found the door open. Upon entering the master bedroom, Winek observed defendant kneeling over Betty and attempting to administer oxygen. When defendant saw Winek, he said, "Help her. Help her." Winek handcuffed defendant and the paramedics began to administer aid to Betty. Betty was taken to Lutheran General Hospital, where she died later that day.

Officer Winek was the only witness who saw the master bedroom before the paramedics entered with their equipment and moved Betty. When Winek first entered the bedroom, Betty was lying on her back on the floor near her side of the bed. She had a bullet wound in her left temple. A revolver was on the floor between Betty and the bed, approximately two feet to Betty's right. After Winek handcuffed defendant, the paramedics entered the bedroom. One removed the shade from the window and the others moved Betty toward the foot of the bed and began to administer first aid. Winek took defendant to the second bedroom, where he noticed that defendant had been shot in the inside of his upper right thigh.

Evidence technicians arrived at approximately 9:10 a.m. Although they instructed the police officers and paramedics not to disturb the scene, numerous objects had already been moved by the paramedics in the course of treating Betty. Photographs were taken of the room. The technicians observed a purse filled with blood on defendant's side of the bed and a revolver on the floor. The purse had been moved by the paramedics. The gun, upon which no fingerprints were found, had blood on both sides of its frame.

Four bullets were recovered from the room. One was recovered from Betty's head, one from the floor beneath Betty's side of the bed, one from the carpeting near the head of Betty's side of the bed, and one from the top of the sheets on the surface of the bed. This last bullet was stained with a red substance and was found near the head of the bed. A large bloodstain was present at the head of Betty's side of the bed. This stain was smeared toward the edge of the bed where Betty was found. Bloodstains were also observed in other places in the bedroom. Samples of these were taken, but because defendant and Betty shared the same ABO blood type, most of the samples proved inadequate to determine the source of the stains. Erethrocyte acid phosphatase (EAP) testing indicated that the large stain on Betty's side of the bed was made by her blood, that the stain on defendant's side of the bed was his blood, and that the large quantity of blood found in Betty's purse was hers. The autopsy revealed that Betty's death had been caused by a contact gunshot wound to the left temple.

A firearms expert testified that all four bullets recovered from the scene had been fired from the gun found in the bedroom. This gun belonged to defendant and had been kept loaded in a drawer of the nightstand at defendant's side of the bed. An examination of defendant's pajama pants showed that he had been shot from a distance of less than six inches, but greater than contact. The bullet entered the front of his right thigh and exited at the rear.

Evidence introduced at trial revealed that Betty had experienced emotional problems several months before her death, but had been successfully treated for them; that the relationship between Betty and defendant was often troubled; that defendant was a gun enthusiast and an experienced marksman, and at the time of Betty's death owned several guns besides the one which killed Betty; that defendant denied shooting Betty when questioned by police immediately after the shooting; and that Betty did not like guns and was inexperienced in their use.

At trial, defendant maintained that Betty had committed suicide. He was tried before the bench, convicted of murder and sentenced to 30 years' imprisonment.

Defendant first contends that he was denied due process of law due to the State's failure to preserve material evidence. It is clear that the State has the duty to preserve and disclose possible exculpatory evidence to the accused in a criminal case. (*People v. McDowell* (1984) 121 Ill. App. 3d 491, 496-97, 459 N.E.2d 1018.) This duty to preserve and disclose evidence focuses on the fairness of the trial process. (121 Ill. App. 3d 491, 497.) We must therefore determine whether the State has breached this duty and, if so, what effect this breach would have on the fairness of the trial process.

Defendant first argues that the State withheld material evidence from him by failing to test his and Betty's hands for gunshot residue. However, a police investigator testified that, due to the contamination of Betty's hands by the presence of adhesive tape applied by the paramedics and by blood, and because defendant had been taken to the hospital, the investigator believed that reliable gunshot residue samples could not have been obtained from the hands of either person. Under these circumstances, we cannot say that the State's actions in failing to obtain gunshot residue evidence amounted to a breach of its duty to preserve evidence.

Defendant next argues that the State breached its duty to disclose evidence by the failure of police investigators

to obtain blood samples from the room in quantities sufficient to show accurate testing to determine the sources of the various stains. The record shows that investigators used cotton swabs to collect blood samples. Expert testimony established that this method is not considered the most reliable for collecting such samples. While the failure of police to obtain sufficient samples of bloodstains may amount to a breach of the State's duty to preserve and disclose material evidence, it does not appear that any unfairness to defendant resulted from such failure here. The trial judge, in announcing his findings as to defendant's guilt, considered the size and location of the stains, rather than the results of the blood tests, in determining their origin. The judge found that the large stain at the head of Betty's side of the bed could, due to its size and shape, only have come from Betty's head wound. It therefore does not appear that defendant was prejudiced by the unavailability of samples of bloodstains found elsewhere in the room. In addition, given the multiplicity of stains and the fact that defendant and Betty shared the same ABO blood type, we do not find that the failure to obtain samples of all the stains was prejudicial, especially given defendant's argument, discussed below, that no accurate method exists to differentiate between the blood of persons who share the same ABO blood type. See *People v. McDowell* (1984), 121 Ill. App. 3d 491, 459 N.E.2d 1018.

Defendant also argues that the failure of the police to examine the bedsheets and the bullet found on the bed was a breach of the State's duty to preserve evidence. However, an examination of these items could only have shown whether Betty was shot while on the bed and whether defendant was shot in the leg by the bullet found on the bed, facts which are ascertainable from the available evidence. We therefore find that defendant was not prejudiced by the failure of the State to have these items examined.

Defendant next contends that the trial court's consideration of inadmissible evidence denied him his right to a

fair trial. Defendant first contends that blood type evidence based on EAP testing, a method used to differentiate blood from persons who share the same ABO blood type, is inadmissible because it has not gained general acceptance in the scientific community. (See *People v. Baynes* (1981), 88 Ill. 2d 225, 240-45, 430 N.E. 2d 1070 (regarding polygraph examinations).) However, the trial court in the instant case made its findings relative to the blood stains on the basis of their size and location, rather than the EAP test results. Therefore, we find that defendant was not prejudiced by the admission of this evidence.

Defendant also objects to the admission into evidence of two letters written by Betty. Defendant argues that these letters were inadmissible hearsay. The letters were intended to show Betty's state of mind at the time of her death and were admitted into evidence under the state of mind exception to the hearsay rule. Defendant argues that the State failed to show that the letters satisfied the two-fold basis for hearsay exceptions—necessity and a reasonable probability of truthfulness—in that it did not establish a reasonable probability that the content of the letters was true. See *People v. Reddock* (1973), 13 Ill. App. 3d 296, 304, 300 N.E.2d 31.

The first letter was written by Betty to her cousin in Yugoslavia. The letter contains statements indicating that Betty was in an optimistic mood immediately prior to her death. Defendant argues that because Betty's daughter testified that it was consistent with Betty's character to refrain from discussing her problems with her cousin, and because the letter omitted references to some of Betty's problems, the letter was inherently unreliable and was improperly admitted as evidence of Betty's state of mind. However, the letter does discuss several of Betty's more serious problems, including her past emotional problems, and the evidence as to Betty's state of mind was corroborated by the testimony of Betty's daughter and of one of her co-workers. In light of these facts, we cannot say the trial court erred in finding the exhibit to be reliable.

The second letter, dated October 5, 1981, was written by Betty to defendant and expresses Betty's displeasure with their relationship and indicates her desire to distance herself from defendant. Defendant argues that this letter was admitted without proper foundation because Betty's daughter, who identified Betty's signature on the letter, lacked personal knowledge of its contents. However, the foundation testimony was directed solely toward identifying Betty's signature. Therefore, Betty's daughter's lack of knowledge of the letter's contents does not affect the reliability of the statements made therein.

Defendant next contends that he was not proven guilty of murder beyond a reasonable doubt because the evidence of his guilt was entirely circumstantial and the State failed to rebut defendant's reasonable hypothesis of suicide.

It has been held that a valid conviction may be based entirely on circumstantial evidence. (*People v. Williams* (1977), 66 Ill. 2d 478, 484, 363 N.E.2d 801.) It is necessary, however, that the proof be of a conclusive nature leading, on the whole, "to a satisfactory conclusion and producing a reasonable and moral certainty that the accused and no one else committed the crime." (66 Ill. 2d 478, 484-85.) Where a conviction of murder rests solely upon circumstantial evidence, the guilt of the defendant must be so thoroughly established as to exclude every reasonable hypothesis of innocence. (*People v. Garrett* (1975), 62 Ill. 2d 151, 163, 339 N.E.2d 753.) It is not required that the facts be such as to exclude all imaginable situations wherein the defendant might possibly be innocent; (*People v. Hargis* (1983), 118 Ill. App. 3d 1064, 1072, 456 N.E.2d 250) and "the trier of fact need not search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Rhodes* (1981), 85 Ill. 2d 241, 249, 422 N.E.2d 605.

In the instant case, certain facts are undisputed. It is clear that Betty died as the result of a single bullet wound to the temple. Expert medical testimony established that,

although Betty could have moved about after the shot, it was far more likely that she collapsed where she was shot, fell immediately into a comatose state and died very shortly thereafter. It is undisputed that Betty was in defendant's apartment when she was killed and that the fatal shot was fired from a gun owned by defendant and kept loaded in his nightstand. It is also undisputed that Betty and defendant were alone in the apartment when the shooting occurred and that no third party is involved in this incident. Therefore, only two explanations for Betty's death are conceivable; she either killed herself or was killed by defendant.

Defendant contends that the evidence introduced at trial was insufficient to prove that Betty was killed by him, rather than by herself. Because defendant is the sole witness to what occurred in his bedroom on November 4, 1981, his testimony as to what transpired is crucial. Defendant testified as follows: He picked Betty up at O'Hare Airport as she returned from San Francisco in the early morning of November 4, 1981. The two drove back to defendant's apartment in Des Plaines, Illinois, where they each had something to eat and drink and discussed their future. Betty told defendant that she wanted them to remarry. She took a bath and then went into the bedroom. Defendant and Betty undressed and got in bed. Defendant reached into the drawer of the nightstand next to his side of the bed for a condom, but did not remove one because Betty said, "I am safe." Defendant left the drawer open. Inside the drawer was a loaded .32 caliber revolver.

Defendant and Betty engaged in sexual intercourse. The room was in total darkness because defendant could not sleep in a lighted room and had covered the windows. After intercourse, defendant went to the bathroom to wash up. He put on his pajamas and came back to lie down on the bed. Defendant testified that Betty asked "what they were going to do with the rest of their lives," and that he replied, "we have to see your mother at noon. We have to drive tomorrow to Traverse City. I am go-

ing to sleep." However, after the shooting, defendant told investigators that he had been arguing with Betty over her desire to remarry immediately prior to the shooting. Defendant testified that he lay down on the bed but did not fall asleep and that as he was lying in bed he heard an "explosion." He rolled out of bed and landed on his hands and knees on the floor near Betty's side of the bed, took two steps to get to his feet and ran down the hallway leading to the front door. He then heard a second "explosion" and returned to the bedroom, where he turned on the closet light and found Betty lying on the floor near her side of the bed with a bullet wound in her head. Defendant telephoned the operator and reported "a shooting." He then ran down the hall to open the front door, leaving the phone off the hook. After going to the bathroom to look for medical supplies, defendant returned to the bedroom to administer oxygen to Betty from a tank he kept. Such was the scene when the police arrived.

When the police and paramedics arrived, defendant was taken to a second bedroom and questioned. Until this time defendant had not noticed that he had been shot in the right thigh, and he did not know when he had been shot. Defendant was questioned by Officer Winek. When asked if he had shot Betty, defendant answered, "No." When asked if Betty had shot him, defendant replied, "I don't know." A few minutes later, Investigator Kraut asked defendant if he had shot Betty and was told, "No. I loved her," but when he asked defendant if Betty had shot him, defendant replied, "I won't answer that." When asked if Betty could handle a gun, defendant replied, "No. She was afraid of guns." To Kraut's questions of whether Betty had shot herself or whether defendant had shot himself, defendant replied, "I won't answer that," to both. Kraut then asked defendant how the shooting had occurred and was told, "I don't know."

In support of his contention that he was not proven guilty of murder beyond a reasonable doubt, defendant cites the decision of our supreme court in *People v. Garrett* (1975), 62 Ill. 2d 151, 339 N.E.2d 753. In *Garrett*, the

court reversed the defendant's murder conviction on the basis of the State's failure to rebut the defendant's reasonable hypothesis of suicide. However, an examination of the facts in *Garrett* shows them to be dissimilar to those of the instant case. In *Garrett*, forensic evidence showed that the characteristics of the victim's wounds were equally consistent with murder or suicide. Other evidence introduced at trial revealed that the victim had been depressed; that she had spoken of committing suicide; that she had just confessed to her husband that she was having an affair, and therefore had a motive to kill herself; and that she had left a note stating that she killed herself. None of these factors is present in the instant case.

An examination of the evidence adduced at trial in the instant case, and especially of defendant's testimony, reveals the implausibility of defendant's suicide hypothesis. The evidence at trial showed that defendant was a gun enthusiast and a marksman, yet he described the gunshots heard by him in the bedroom as "explosions." It is unlikely that a man with as much experience with firearms as defendant would be unable to identify the sound of gunshots. In addition, defendant claims to have heard only two shots, while the evidence shows that four were fired. Defendant's explanation of this discrepancy is that he was rendered temporarily deaf by the sound of the first shot and therefore heard only one of the other three. However, even considering the possibility that one of the shots was muffled because it was fired on contact into Betty's head, it is apparent that all the shots were fired within a period of only a few seconds, and it is unlikely that defendant's temporary deafness would abate quickly enough to allow him to hear another of the shots.

In addition, the fact that four shots were fired is itself inconsistent with defendant's hypothesis of suicide. Defendant proposes several scenarios to explain why Betty would have fired four shots when she intended to kill herself. Defendant argues that three of the shots were "hesitation shots," misses which defendant claims are

often fired by persons attempting suicide before the fatal shot is fired. However, no evidence supporting defendant's theory of "hesitation shots" was introduced at trial. In addition, the location of the spent bullets is inconsistent with any claim that they were fired by Betty in an attempt to hit her left temple as she lay on the bed.

It is also significant that, although Betty had been shot in the left temple, the evidence adduced at trial shows that she was right-handed and that she had lost the ring finger of her left hand in an accident several years prior to her death, and consequently seldom used that hand. It is therefore highly unlikely that Betty would have held a gun with her left hand and shot herself in the left side of the head. Defendant's expert testimony that a study of 55 suicide cases involving right-handed people revealed that five of them shot themselves with their left hands does not demonstrate a significant probability that Betty would have used her left hand to shoot herself, especially in light of the permanent disabling injury to that hand and the evidence that she seldom used it.

Testimony was also presented that Betty was not able to handle guns and was, in fact, afraid of them. Defendant testified that he had taught Betty how to fire a handgun by having her fire two shots from their car into a cornfield outside a gun club in Elburn. We find that the trial court was clearly correct in finding this testimony to be incredible, it being unlikely that defendant and Betty would drive all the way to a firing range in Elburn, only to fire their gun into a cornfield outside the club, or that an experienced marksman would allow a gun to be fired from his car into a cornfield.

Defendant's telephone conversation with Betty's former husband, George Nuter, also casts doubt on defendant's suicide theory. Nuter testified that he received a telephone call from defendant a day or two after Betty's death, regarding funeral arrangements. After arguing with defendant about this subject, Nuter asked defendant why he killed Betty, and defendant replied, "I don't know. I

don't know." Nuter then asked defendant, "You pulled the trigger, didn't you? You did kill her?" Defendant responded, "I know. I know."

Also significant is the fact that no fingerprints were found on the gun used in the shooting, an indication that the gun had been wiped clean by the person who last handled it. It would not, of course, have been possible for Betty to have wiped the gun clean if she had killed herself with it.

The evidence also showed that the bullet which passed through defendant's right leg was fired from a distance of less than six inches, and passed through an area of the leg not containing major nerves or blood vessels. The trial court's finding that the characteristics of this wound were more consistent with self-infliction than with infliction at the hand of another was not, in our opinion, unjustified, although no expert testimony was elicited regarding this question.

In contrast to the facts in *Garrett*, the evidence presented in the instant case is clearly more consistent with murder than with defendant's theory of suicide. The evidence shows that the large, smeared bloodstain at the head of Betty's side of the bed was most probably made by Betty being shot while she was lying on the bed and then being slid onto the floor, where the police found her. The evidence also reveals that Betty was shot with a gun owned by defendant and kept in the nightstand near his side of the bed; that the gun was found to be completely devoid of fingerprints or smudges; that four bullets had been fired from the gun and were found in locations which render highly unlikely the possibility that Betty had fired them while aiming the gun at her head; that Betty, although she had for many years been disabled by the loss of a finger from her left hand and was shown to have seldom used that hand, was shot in the left temple; that defendant, a gun enthusiast and an experienced marksman, claimed to be unable to distinguish between the sound of an explosion and that of a gunshot and claimed

to have allowed his wife to fire a gun from their car into a cornfield; that Betty was shown to have had an aversion to guns and to have been inexperienced in their use; and finally, that Betty had been in an optimistic mood immediately prior to her death.

Defendant's theory that Betty killed herself is not supported by this evidence. In *Garrett*, the evidence was equally consistent with murder or suicide, and our supreme court found that the defendant had not been proven guilty to a reasonable and moral certainty. In the instant case, however, the evidence is much more consistent with murder than with suicide. We therefore find that no reasonable hypothesis of innocence existed and that the trial court properly found that the evidence in the instant case established defendant's guilt to a reasonable and moral certainty.

The decision of the circuit court is affirmed.

Affirmed.

Hartman and Perlin, JJ., concur.

APPENDIX C

State of Illinois
County of Cook—ss.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CRIMINAL DIVISION
THIRD DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Des Plaines Court
-vs-	)	No. 82-C-810.
EDWARD ROSS.	)	Charge: Murder.

REPORT OF PROCEEDINGS

[1]* BE IT REMEMBERED that on the 16th day of June, A.D., 1983, this cause came on for hearing, before the Honorable LESTER A. BONAGURO, Judge of Said Court.

APPEARANCES:

HON. RICHARD M. DALEY,
State's Attorney of Cook County, by
MR. BRUCE PAYNTER,
Assistant State's Attorney,
appeared on behalf of the People;

* Numbers in brackets refer to the pagination of the Official Court Reporter's transcript of proceedings.

MR. JOSEPH FAGEN,
MR. GLENN SEIDEN,
MR. ALAN LOIBEN,
Attorneys at law,
appeared on behalf of the Defendant Ross.

* * * * *

[2] THE CLERK: The People of the State of Illinois versus Edward Ross, 82C810.

MR. SEIDEN: Good afternoon, your Honor. Glenn Seiden, Joseph Fagen, Alan Loiben for Ed Ross present before the Court.

MR. PAYNTER: Bruce Paynter for the People, your Honor.

THE COURT: All parties in this case being present, we'll proceed with the matter set for this afternoon which is the finding of the Court.

It's obvious to everybody the courtroom is very crowded. If there are relatives and friends from both sides--in this case by both sides I mean Edward Ross, Betty Ross--present in the courtroom, the first thing I want to do is advise you, while I am making my findings, entering my findings, there's any kind of speaking out or outbursts, the person responsible for that will be removed immediately from the courtroom.

We know that in criminal law, it's clearly the law that a conviction of a criminal charge must be based solely upon circumstantial evidence if that circumstantial evidence excludes every reasonable theory of innocence.

[3] Now, in this particular case there are many facts and circumstances introduced into evidence in connection with the death of Betty Ross. Many of those facts have little or no significance or are inconclusive. However, there are a number of essential facts in the case which are either not in dispute or which can reasonably be found from the evidence.

The essential facts established by the evidence in this case support the following conclusions: Betty Ross and

Edward Ross had a troubled relationship as evidenced by their two marriages and two divorces to each other. This troubled relationship continued right up to November 4, 1981. That Betty Ross arrived in Chicago on November 4, 1981, in the early morning hours. She was picked up at the airport by the Defendant, Edward Ross, and taken to the apartment of Edward Ross. At the apartment Edward Ross and Betty Ross occupied a bed in the master bedroom. That they engaged at some point in sexual intercourse. That there occurred at some point a discussion of their relationship. That Edward Ross occupied the north side of the bed and Betty Ross the south side of the bed, the head end being the east end of the bed. [4] That at some point around 9:00 a.m. or shortly before 9:00 a.m. Betty Ross sustained a fatal bullet wound to her head. The entry of the wound being in the left temple. The bullet entering her brain and causing her death.

That Betty Ross was right-handed; that the Defendant, Edward Ross is right-handed. That the gun shown to be the fatal weapon belonged to the Defendant, Edward Ross and was kept in the drawer of the night table on the north side of the bed. That when the first Officer and paramedics arrived, Betty Ross was lying on the floor to the south side of the bed with her head generally towards the east wall, while her feet were generally towards the south wall. I'm sorry. Let me correct that. With her feet generally towards the west wall of the bedroom. That at that time the Defendant, Edward Ross was kneeling over Betty Ross attempting to administer oxygen or other resuscitation measures. That at that time Edward Ross was suffering from a bullet wound to the right thigh with entry being to the left of the front center; exit to the rear of the leg.

That the bed sheet visible in a number of photographic exhibits contains blood stains towards the [5] upper or head portion of the south side or Betty's side of the bed. Just for reference purposes, I'm going to display these photographs of the bedroom and particularly the upper portion of the bed. All of these having been admitted into evidence.

It is undisputed in this case that Betty Ross was on the floor when the police and paramedics arrived. Edward Ross himself testified that he found Betty on the floor next to the south side of the bed. The question then becomes: How did Betty Ross get to that spot on the floor?

There were numerous blood stains and blood droppings in various parts of the apartment and on various parts of the floor and carpeting. The meaning of these is unclear and subject to a great deal of question because of the number of people who had entered the apartment. It is likely that those marks which appear to be blood droppings were left by the Defendant as he was wounded and was bleeding from the upper portion of his right leg. However, there's no evidence that anyone—although there's a great deal of evidence a number of people walked on the floor or floors of that apartment—there's absolutely no evidence that anyone walked on the bed [6] or did anything to alter or change the blood stains that were on the upper portion, head end of the south side or Betty's side of the bed.

I believe from these facts it be concluded beyond a reasonable doubt that Betty Ross bled on the bed; that that is where she was shot, and that she was then slid, pulled off, or pushed off the bed onto the floor where she lay when the investigating officer and paramedics arrived. There's only one reasonable explanation supported by the evidence in this case for that area of blood stain on the south side of the bed at the head end; that is that Betty was shot there. And as I already stated was slid, pulled, or pushed off the south edge of the bed. And this is strongly supported by the photographic exhibits which shown the stains I am referring to commencing somewhat to the south of the center or Betty's side of the bed and being smeared across the south upper head end of the bed all the way to the edge which is a point which she would have been lifted off or fallen off on to the floor. And I think it's reasonable—it is reasonable to conclude this was Betty's blood, even if we disregard the forensic scientist's identification of that blood being an enzyme type of Betty Ross.

[7] The only alternative hypothesis theory of innocence advanced by the defense, Defendant, Edward Ross, was that Edward Ross was shot in the right thigh while he was lying on the north side of the bed, and at the point when Edward Ross states that he heard the first explosion. Yet, the evidence indicates no spent bullet or projectile being recovered in that area of the bed or on the floor at the north end of the bedroom. At least no bullet could reasonably have been the one that pierced his leg.

Of the four spent bullets, one was recovered from Betty Ross' head. One flagrant bullet was recovered from the top of the bed, south of the center line as evidenced by the photographs, and the testimony of the first investigating officer on the scene, and two others on the floor at the south side of the bed being directly under the metal bed frame at the south end of the bed. The other being under the carpeting towards the east wall. Defendant's theory is that he was laying in bed, heard an explosion, felt nothing at that time. That he got out of bed by moving across to the left or south side of the bed and not making any physical contact with Betty Ross at that time. [8] The gunshot wound or the gunshot that was fired at the Defendant's leg was fired from a distance, according to the testimony of the forensic scientist who testified, from a distance of one inch to six inches from the pajamas leg. This would mean if Betty Ross shot Edward Ross, either standing on the north side of the bed holding the gun to within one inch up to six inches of the pajamas leg, fired the shot and at some point walked around to the south side of the bed, back towards the night table where she shot—held the gun to her, held and pulled the trigger, thereby falling on the floor to the south side of the bed. That is one possibility. The other possibility would be that Betty Ross was on the south side of the bed and placed herself in a position closer to Edward Ross who was on the north side of the bed in order to shoot him in the right leg, again from a distance of one inch to six inches. That she then moved off the bed to a position near the south side night table again, waited until Edward Ross moved past her, as he moved off the bed,

as he testified after hearing the explosion, and moving out and then walked out to down the hallway. That she then put the gun to her head and pulled the trigger. None of these [9] theories I have just mentioned account for the relatively large blood stain on the sheet on the south side of the bed towards the head. Which, under the facts of this case could only have been made by Betty Ross being shot while she was positioned on that side of the bed, and then being pulled, pushed, or slid off across to the south side of the bed and on to the floor.

Based on the Defendant's account of how he was shot, a projectile should have been found in, on, or around the north side of the bed where the Defendant said he was laying awake when he heard the first explosion. No spent projectiles were recovered on the north side of the bed or bedroom. There was no damage then to the carpeting or no damage to the north side of the carpeting or north side of the bed which one might expect had a shot been fired through his leg on the north side of the bed.

Further, Evidence Technician testified that the gun was dusted for prints. That no prints were raised, and that nothing was observed on the gun that could be identified as a smudge or fingerprint.

Other significant factors include the greater than not likelihood that a person committing suicide would not shoot themselves on the opposite [10] side of their head from their handedness. In this case Betty was right-handed. By the Defendant's own expert, it was testified that based on a study, there's about a ninety-two percent chance against a person committing suicide by shooting themselves in the opposite side of the head. Additional factors, the Defendant is right-handed, and this is consistent with a gunshot wound to the left side of Betty's head. An additional factor, the Defendant's account of stopping his automobile on his way to a sportsman club and asking Betty Ross to fire two shots into a corn field is not believable. It's not believable because an experienced sportsman would not fire or cause a gun to be fired on the road into the sports club, but wait until he arrives at the range. And that, by the way, is the only evidence

that Betty Ross had any experience with firing a gun or was capable of firing a gun. That particular portion of the Defendant's testimony was also not credible, because it was not subject to verification. It was offered as an effort to have some indication that Betty Ross had experience with guns. As I indicated, it was not believable.

Another significant factor is that the murder [11] weapon in this case was in the drawer of the right, or night stand next to the north side or Edward Ross' side of the bed. And it was most accessible to Edward Ross than it was to Betty Ross. The Defendant's testimony that he slid across the south side of the bed after hearing the first explosion was, in my judgment, an effort on his part to explain the rather large and long stain pictured in the exhibits on Betty's side of the bed towards the head end. Even if Ed Ross had exited the bed on the south side after being shot, if he was losing blood at that time from the wound in his right thigh, he could not have left these particular stains, because upon exiting the bed to his left would be, would have been facing in a southerly direction, thus, the left leg, uninjured leg was nearest the bed sheet. Leaving of the stain by Ed Ross is very unlikely. Blood on the south side of the bed indicates that the body of Betty Ross was slid or pulled across the bed sheet off the bed on to the floor. This explains the stains which begin south of the center of the bed towards the head end, proceed all the way to the edge of the bed, down the side of the bed and on to the floor. This blood that I have just described would not be there if Betty Ross [12] shot while standing on the floor of the south side of the bed as the defense theory postulates.

Finally, the wound to the Defendant's right thigh is more consistent with a self-inflicted wound than with any reasonable theory which Betty Ross might have inflicted that wound.

Under the facts of this case, based on these findings, I enter a finding of guilty to the offense of Murder. Again, Edward Ross, in the manner and form as charged in the Information, I hereby enter judgement on the finding, and I hereby revoke the Defendant's bail.

MR. SEIDEN: Your Honor, we are going to have a motion with respect to the bond. We'd ask the Court to allow the bond to stand pending appeal. Or, in the alternative, we'd like the Court to establish an appeal bond. Mr. Ross has no background, has been in court each and every time he's been required to be here. If your Honor—Of course I'm not going to re-argue the case, if your Honor—and your Honor has entered the order you have entered, that I believe, your Honor's probably done so based upon the belief that the crime committed—it's very hard for me to say that, but the crime that you indicate is committed [13] is one of sudden and intense passion, not to confuse it with Manslaughter. And we believe that Mr. Ross would not be a threat nor would it be necessary to maintain or restrict Mr. Ross for purposes of being concerned about him fleeing the jurisdiction. Therefore, I'm asking that Mr. Ross be granted a bond for purposes of filing post-trial motions and appeal.

THE COURT: I'll enter and continue your motion, take it under advisement and set a date for hearing additional argument and evidence on your motion setting appeal bond.

In the meantime, bond is revoked by order of Presentence Investigation.

MR. PAYNTER: You want to set it normally, approximately a thirty day date for the Presentence Investigation?

THE COURT: As soon as possible.

MR. PAYNTER: I'm wondering what date you want to set with regard to the taking of the motion for an appeal bond under advisement?

THE COURT: Let's say two weeks. Continue this case to—

MR. SEIDEN: Make it July. I'd ask—

THE COURT: July 7th, two weeks from today.

[14] MR. PAYNTER: Your Honor, excuse me. That is, if I could just ask for July 6th?

THE COURT: July 6th.

MR. PAYNTER: Thank you.

MR. SEIDEN: Make that the 5th, Judge?

MR. PAYNTER: That is convenient.

THE COURT: July 5th. All right, Order of Court, cause continued to July 5th for further hearing on a Motion to set an Appeal Bond, also for return of the Presentence Investigation. If that is possible, ask the Probation Department if it's possible.

Any further business before the Court in connection with this particular case?

MR. PAYNTER: Your Honor, with respect to all of the exhibits, I would ask leave of Court to take custody of both the State's and Defense's Court exhibits for purposes of an impounding order to present to the Court July the 5th.

MR. SEIDEN: We'd join in that.

THE COURT: Any objection?

MR. SEIDEN: None at all, Judge.

THE COURT: That will be the order.

MR. PAYNTER: I have nothing further, your Honor.

THE COURT: The Court is recessed until [15] 9:30 tomorrow morning. The Court stands recessed until 9:30 tomorrow morning.

(WHEREUPON other matters on the trial call were heard.)

THE COURT: The People versus Edward Ross.

MR. SEIDEN: Glenn Seiden, S-E-I-D-E-N, your Honor. At this time we have a motion C.B.R. which we are going to ask to file and ask it be entered and continued until that it be granted, but that the motion be—I'm sorry. We are going to file the motion now, like the motion entered and continued until July 5th. Thereby staying the processing of the bond until that time.

THE COURT: All right.

MR. SEIDEN: Would you inquire of Mr. Ross, your Honor?

THE COURT: Well, I don't want to do that at this point, because I gather that you are asking to have it entered and continued.

MR. SEIDEN: That is correct.

THE COURT: Because there's some question—

MR. SEIDEN: Judge, very simply, if your Honor sees fit to grant additional appeal bond, your Honor may indeed grant an appeal bond the same amount. [16] Then again, there's a possibility your Honor will require an additional posting.

THE COURT: Mr. Ross, I show you what is entitled Defendant's petition requesting the refund of bail to the attorney of record. Does that bear your signature?

DEFENDANT ROSS: Yes, it does.

THE COURT: Understand, by signing that you would be releasing your bond and permitting the Court to enter an order turning the proceeds of your bond over to your attorney?

DEFENDANT ROSS: Well, I had signed said before turning it over.

MR. SEIDEN: It's the same form. Used a different form, used a form I didn't have one.

DEFENDANT ROSS: Yes, I do.

THE COURT: Based on that, the Motion for the Refund of the Bond to Attorney, entered and continued. No order is entered on it.

MR. SEIDEN: We'd like a condition of bond, then to remain the same until July 5th at least so the Clerk's office doesn't process it, return it.

THE COURT: Simply entered and continued, July 5th.

MR. SEIDEN: We are going to ask leave to submit [17] the documents which have been signed, to the Court file. We'll hold bond.

Thank you very much.

I'm sorry. You need to sign it, Judge.

THE COURT: It's only entered and continued.

MR. SEIDEN: Okay, have it your way.

(WHEREUPON the above-entitled cause was continued to July 5, 1983.)

* * * * *

[18] [Certificate of Official Court Reporter omitted in printing.]

APPENDIX D

State of Kansas
County of Shawnee—ss

AFFIDAVIT

Be it known that on the 22nd day of March, 1985, before me, Helen Ohlsson, a Notary Public in and for the county and state aforesaid, duly commissioned and sworn, and by law authorized to administer oaths and affirmations, personally appeared Robert D. Olsen, Sr., of the City of Burlingame, in the County of Osage and State of Kansas, and being by me first duly sworn, upon his oath deposes and states as follows:

1. I have been examining fingerprints as a criminal investigator since February, 1963, when I first entered the Criminal Investigation Division of the United States Army. I was Special Agent in Charge of the Army's Latent Fingerprint Division based in Europe, which served all Department of Defense agencies in Europe, Africa and the Middle East, from 1970 to 1973 and in Fort Gordon, Georgia, which served all Department of Defense agencies in the Western Hemisphere, from 1973 to 1978. I am and have been Supervisor of the Physical Evidence Section of the Kansas Bureau of Investigation in Topeka, Kansas with primary emphasis as a latent print examiner since January, 1979.

2. I have authored three published books on fingerprints including the second edition in 1978 of the leading treatise in the field, *Scott's Fingerprint Mechanics*, as well as *Program of Instruction for Latent Fingerprint Examiner Course* for the U.S. Army Military Police School in 1976 and *Problem Solving Techniques in Latent Print Identification* for the FBI Academy in 1983, and thirteen articles on fingerprints which were published in various professional journals.

3. Latent fingerprints are defined as those prints which are not visible to the naked eye and require some development technique to produce color to the impression. Powder dusting is such a technique.

4. All firearms, including handguns, which have received even a minimum amount of care and maintenance are covered with a thin coating of oil. Powders used for fingerprint dusting adhere to all fluid or moisture, including oil, indiscriminantly. In the ordinary course, therefore, it is extremely difficult to recover fingerprints from firearms. This applies equally to firearm handles which are made from wood or plastic as they would be covered with oil as well.

5. During the course of my 22 years of experience examining firearms for fingerprints for the United States Army and police departments, I have examined several thousand handguns. I have discovered no detail of latent fingerprints, whatever, on approximately 80% of the handguns I have examined.

6. It is scientifically invalid to conclude that a handgun has been wiped clean because a technician fails to recover any fingerprint evidence.

7. Further affiant sayeth not.

/s/ Robert D. Olsen, Sr.

* * * * *

[Notarization and jurat omitted in printing.]

State of Illinois
County of Cook—ss

AFFIDAVIT

I, David Lee Grieve, on oath state as follows:

1. I am currently employed as a Training and Application Coordinator, Latent Prints for the Illinois Department of Law Enforcement, Bureau of Scientific Services located at 1401 South Maybrook Drive, Maywood, Illinois 60153.

2. I have been employed with the Bureau since December 1982.

3. I was employed by the Portland Police Bureau in Portland, Oregon from 1965 to 1974 as a fingerprint identification technician.

4. I began my training in fingerprint technology in 1965. In 1965, I was given 160 hours of basic fingerprint instruction by the Portland Police Bureau.

5. In 1967 I was given 40 hours of instruction in advanced latent fingerprints by the Portland Police Bureau.

6. From 1974 to 1982 I was the Fingerprint Supervisor of the Washington State Identification Section of the Washington State Patrol at Olympia, Washington.

7. Patent fingerprints are defined as those prints which are visible to the naked eye without dusting or any other treatment. In the ordinary course of events, patent fingerprints are only present when the person who touched the object had some colored substance present on his or her hands.

8. Patent fingerprints would not be present on a gun or other firearm unless the person holding the gun had a substance on his or her hands.

9. Latent fingerprints are fingerprints that require some development technique to produce color to the impression. Dusting is such a technique.

10. Firearms, including handguns, if well maintained, are covered with a thin coating of oil. Black powder used for dusting, or any other powder used for fingerprint dusting, adheres to all fluid or moisture, including oil, indiscriminately. In the ordinary course, therefore, it is difficult or impossible to recover fingerprints from handguns.

11. During the course of my 19 years of experience examining fingerprints on firearms for police departments, I have examined between 150 and 200 handguns. I have discovered patent prints on only 5 of the handguns I have examined. I have discovered latent prints on 10 or fewer handguns.

12. The absence of fingerprint detail is not a scientifically valid basis for any conclusion with regard to the handling of a handgun.

Further affiant sayeth not.

/s/ David Lee Grieve

[Notarization omitted in printing.]

Supreme Court, U.S.
FILED
JAN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EDWARD ROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

BEST AVAILABLE COPY

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court properly held that no material or exculpatory evidence was withheld from defendant.

II.

Whether the People's evidence proved defendant guilty of murder beyond a reasonable doubt where the hypothesis of suicide was patently unreasonable.

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I.

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NO. 85-938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EDWARD ROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE APPELLATE
COURT OF ILLINOIS, FIRST DISTRICT

OPINION BELOW

The order of the Appellate Court of Illinois, First District, reversing and remanding the trial court's decision, was issued as a published opinion on March 12, 1983. The Illinois Supreme Court denied Petitioner's Appeal as of Right and Leave to Appeal on October 2, 1985.

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for Writ of Certiorari. However, as treated more fully within the following argument, the respondent believes that the petition has failed to show any good reason for this Court to exercise jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

Defendant was convicted of the murder of his ex-wife Betty Ross and senteced to 30 years imprisonment. The facts as they relate to this action have been set forth in the Petition for Writ of Certiorari and in the Appellate Court opinion attached to that Petition. Thus, pursuant to Supreme Court Rules they will not be repeated here.

I.

NO MATERIAL OR EXCULPATORY EVIDENCE WAS WITHHELD FROM DEFENDANT BY THE PEOPLE AND ANY FAILURE TO COLLECT FURTHER EVIDENCE IS EXPLAINED BY THE GOOD FAITH DETERMINATION BY THE POLICE THAT COLLECTION OF SUCH EVIDENCE WAS NEITHER FEASIBLE NOR PROBATIVE OF DEFENDANT'S GUILT OR INNOCENCE.

Defendant contends that he was denied due process of law because the People failed to preserve material evidence. The People maintain that no evidence of a material or exculpatory nature was withheld from defendant by the People and any failure to collect further, only arguably relevant evidence is explained by the good faith determination by the police that collection of such evidence was neither feasible nor probative of defendant's guilt.

The Due Process Clause of the Fourteenth Amendment requires the People to disclose to the accused in a criminal case evidence that is material either to guilt or punishment. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1969). Whatever duty the Constitution imposes on the States to preserve and disclose evidence is limited to evidence that might be expected to play a significant role in the defense of the accused. In other words, the evidence must both possess an exculpatory value that is apparent before the evidence is destroyed and it must also be of such a nature that the accused could not obtain comparable evidence by reasonably available means. California v. Trombetta, 104 S.Ct. 2528 (1984). The duty of the State to

disclose evidence to a defendant first attaches when the State has first gathered and taken possession of the evidence of a crime so that vital evidence is not destroyed before prosecution begins or before a defendant hears of the existence of certain evidence. People v. McDowell, 121 Ill. App. 3d 491, 459 N.E.2d 1018 (1st Dist. 1984).

Although defendant phrases his petition in terms of the rule announced in Brady v. Maryland that the People must preserve and disclose evidence exculpatory to the defendant, when his petition is analyzed he is actually asking for a new rule which would require the People to take affirmative steps to collect and to preserve evidence which could be exculpatory. However, such a theory is not the law. Still, defendant applies this rule to the

case at hand when he complains of the "failure" of the police to test for gunshot residue on the hands of defendant and Betty Ross. Officer Dan Quealy, an evidence technician for the Cook County Sheriff's Police, was in charge of evidence collection at the crime scene in the case at hand. When Quealy arrived on the scene, defendant had already departed for the hospital so he had no opportunity to test defendant's hand for gunshot residue. (R. 804) At this time Betty was being administered to by the paramedics. (R. 805) Betty was shot in the left temple so if suicide was to be a hypothesis it only would have made sense to test for gunshot residue on her left hand. But, Quealy noticed that Betty's left hand was contaminated by blood, by adhesive tape applied by the paramedics and by contact with

the carpet. (R. 936-938) Quealy therefore made the determination that any residue tests would not have produced any meaningful results. (R. 951) The fact that a laboratory scientist without criminal field experience testified on behalf of defendant that Quealy's determination may have been mistaken in basis does not alter the fact that Quealy's opinion was formulated in a good faith on-the-spot situation. As in Trombetta the record here "contains no allegation of official animus toward respondents or of a conscious effort to suppress exculpatory evidence." California v. Trombetta, 104 S.Ct. at 2534. Furthermore, it is by no means clear that the gunshot residue tests would have revealed exculpatory evidence. To the contrary, given the extensive evidence of defendant's guilt in this case, it is clear that the

tests would have been inculpatory rather than exculpatory. As in Trombetta there is no reason to believe that the authorities here were out to get defendant so that they intentionally failed to take the tests which would have solved the case because such tests might show that Betty killed herself. Instead, the investigators simply decided residue tests were infeasible and therefore did not take them.

II.

DEFENDANT WAS PROVEN GUILTY BEYOND ANY REASONABLE DOUBT OF MURDER WHERE THE HYPOTHESIS OF SUICIDE WAS PATIENTLY UNREASONABLE.

A review of the facts in the case at hand demonstrates conclusively that the only reasonable explanation for Betty Ross' death is that she was murdered by defendant. As a starting point it is clear that Betty Ross died as a result of a single bullet to the head. (R. 488) Expert medical testimony demonstrated that Betty's wound was a contact wound caused by the gun being placed directly against her left temple and fired into her brain. (R. 481) Although Dr. Choi, the medical expert, could not conclusively state that Betty could not have walked after the shot to the head it

was far more likely that Betty collapsed where she was shot, fell immediately into a comatose state and died very shortly thereafter.

It is undisputed that Betty was in defendant's apartment when killed and was actually killed by defendant's gun. It is also undisputed that Betty and defendant were alone together when the shooting occurred and that no third party was involved in this crime. Thus, only two explanations for Betty's death are conceivable, either she was killed by defendant or she killed herself.

After picking up Betty from the airport and driving to his apartment defendant and Betty had sexual relations. (R. 1544) The room was in total darkness since defendant could not sleep in a lighted room and therefore had blocked out all light

from the window. (R. 1544-1545) After intercourse defendant washed up, put on his pajamas and came back to lie down on the north side of the bed. (R. 1546-1547) On the day of the incident defendant admitted to Cook County Sheriff Investigator Lawrence Troka that he had been arguing with Betty over remarriage immediately prior to the shooting. (R. 129) Likewise, defendant stated to Investigator Kraut on the same day that he and Betty had had a fight. (R. 562) Defendant lay down in the bed but did not fall asleep. (R. 1623) As defendant was lying in bed he heard an "explosion." (R. 1546) Defendant claims he rolled out of bed and landed on all fours on the north side of the bed, he took two steps to get vertical and headed down the hallway leading to the front door. (R. 1546-47) Defendant then heard a second

"explosion" and returned to the bedroom where he turned on the closet light to reveal Betty lying on the floor at the south side of the bed with a bullet hole in her head. (R. 129) Defendant picked up the telephone from the nightstand, called the operator and "I (defendant) said there was a shooting." (R. 1549) Defendant left the telephone off the hook and claimed he ran down the hall to open the front door for the paramedics who would soon arrive. (R. 1549-50)

When the police and paramedics arrived defendant was ushered into a second bedroom where he was questioned. (R. 60) Until defendant was removed into this room he had not noticed that he had been shot in the right thigh and had no idea exactly when he might have been shot. (R. 1556, 1640) After receiving and understanding his

Miranda rights defendant was first interviewed by Officer Winek. Defendant, when asked if he had shot Betty, answered "No." (R. 62-63) When asked if Betty had shot him, defendant replied, "I don't know." (R. 62-63) Minutes later Investigator Kraut asked defendant if he shot Betty and was told "No, I loved her", but when asked if Betty had shot him, defendant answered "I won't answer that." (R. 563) When asked if Betty could handle guns defendant replied "No, she was afraid of guns." (R. 563) To Kraut's questions of whether Betty had shot herself or whether defendant had shot himself defendant answered, "I won't answer that" to both. (R. 563) Kraut then asked defendant how the shooting occurred and was told "I don't know." (R. 564)

A closer examination of defendant's tale when compared with other evidence

adduced at trial reveals its inherent implausibility. Here defendant is clearly a man who is very fond of guns. Defendant had a loaded revolver in his nightstand next to his bed. In his second bedroom defendant had shotguns and large quantities of extra ammunition. (R. 64) Defendant was an expert marksman with numerous shooting awards. In spite of this familiarity with guns, indeed, this love of guns, defendant, upon hearing gunshots in his own bedroom, states that he only heard an "explosion." It is patently implausible that a man with such very extensive firearm experience should confuse a gunshot with an explosion.

The most basic refutation of suicide is that Betty Ross was right handed but shot in the left temple. (R. 203) According to a study of suicide cases in-

troduced by defendant's own expert Joseph Nicol 92%. of the right-handed suicide victims in the study shot themselves in the right sides and while the number of left-handers in the study was too small to be statistically significant all five of the left-handed subjects in the sample shot themselves in the left side. (R. 1481-83) Furthermore, Betty was missing the ring-finger on her left hand due to an accident several years earlier. (R. 203) Common sense and statistics indicate that right-handed suicides shoot themselves in the right side of the head. It is clearly unreasonable to suggest that a person who phones, writes, throws, files in short does everything with her right hand will pick up a gun with her left hand, a hand missing a finger, and having never shot a gun, shoot herself in the head with that hand. At

trial defendant attempted to explain that Betty was familiar with the murder weapon previous to the incident. According to defendant's story, in July or September of 1981 defendant and Betty drove to the St. Charles Gun Club in Elburn, Illinois, over half an hour from his home to test out his new gun which had never been fired. (R. 1560) The road into the club was about ½ mile in length and lined with cornfields. (R. 1660-61) About midway along that road defendant stopped the car, took the gun out of its case, handed the gun to Betty who fired two shots into the cornfield to test the gun out. (R. 1661) This episode conveniently dispels the notion that Betty was afraid of guns. Furthermore, it was the only evidence whatsoever introduced at trial that Betty had ever fired a gun. Unfortunately for defendant the story is

inherently implausible. Why would a couple drive all the way to Elburn to test shoot a gun, then stop in the very driveway of the club and fire only two shots into a cornfield? Why would an experienced marksman shoot into an empty cornfield at all? Indeed, the trial court found the story inherently unbelievable for those reasons as did the Appellate Court. (Deft. Br. Appendix A-10)

Defendant's telephone conversation with Betty's former husband George Nuter casts a further shadow over defendant's credibility. Nuter testified at trial that he received a telephone call from defendant a day or two after Betty's death regarding burial arrangements. (R. 647-48) After a heated discussion about this subject Nuter asked defendant why he killed Betty and defendant replied "I don't know, I don't

know." (R. 648) Nuter then asked defendant "You pulled the trigger didn't you? You did kill her?" and defendant responded "I know. I know." (R. 648) The conversation then degenerated into name-calling and then terminated. (R. 648) Commenting on this exchange at trial defendant made the curious statement that "I have heard the testimony here so I mean I have to answer accordingly" and explained that as Nuter went into a tirade he did indeed answer "I know. I know." (R. 1568) Clearly defendant has made an inculpatory admission and his comment at trial indicated that he wished he could get around it but could not.

Defendant and Betty Ross, in the course of their relationship, were beset by troubles, jealousies and arguments. First married to each other around 1973 they were

divorced in 1976. (R. 158) Remarried a month later they were divorced again in 1978. (R. 1502) Defendant and Betty saw each other off and on in varying degrees of seriousness between 1978 and 1981. As recently as October 3 of 1981, a month before Betty's death, they had a major argument after which they engaged in yet another temporary cessation of the relationship. (R. 1523) At trial numerous letters were produced which showed that Betty Ross was afraid of defendant, that his insecurity and jealousy was disturbing her. (S. R. 8) Letters from defendant to Betty clearly indicated that it was defendant not Betty who insisted on reconciliation.

Contrary to defendant's assertions, there was no indication that Betty was suicidal or depressed prior to her death.

Indeed, those friends and relatives who testified at trial stated that Betty was very happy and optimistic. (R. 685, 215-216) Her letters indicated likewise. Finally, Betty was undergoing treatment for allergy not psychiatric problems in the spring prior to her death. (R. 1203) Betty was simply not suicidal.

Defendant also places heavy emphasis on the theory that the other shots fired into the floor were "hesitation shots" commonly found in suicide attempts. Once again, defendant has raised an issue on appeal for which he introduced no evidence at trial. Furthermore, given defendant's construction of the facts any hesitation shots could not have been found anywhere at the walls or ceiling and not in the floor.

In his petition defendant claims that the fact that Betty survived the shot for a

period of time lends credibility to his suicide hypothesis. The theory behind this statement is that if defendant truly wanted to kill Betty he would have fired more than one shot into her head to make sure she was dead. To support this theory defendant again impermissibly relies on evidence from a treatise on homicide investigations which was not admitted at trial. Furthermore, if defendant had shot Betty more than once it would have been quite difficult for him to claim that Betty killed herself. Since Betty was killed in defendant's apartment, with defendant's gun, his only chance of escaping liability for this crime was to make it look as if Betty killed herself and this story could not be maintained if Betty had more than one bullet hole in her head.

Interestingly, defendant's gun was recovered at the crime scene and dusted for

fingerprints but no prints were raised from the gun. Once again defendant in his petition introduces evidence not introduced at trial to the effect that a properly maintained gun will often have a light coat of oil over its metallic parts to prevent rust, and therefore prohibit raising of prints. Notwithstanding defendant's failure to argue this issue at trial, his argument fails by its very terms since no prints, not even partial prints, were recovered from the handle of the gun which was not made of metal and therefore not covered with oil to prevent rust. The lack of even partial prints can only be explained by the fact that the gun was wiped off after being fired and of course defendant was the only person alive who could have wiped off the gun.

The basic rule of law expounded in In re Winship, 397 U.S. 358 (1970), simply

requires that defendants be proven guilty beyond any reasonable doubt. Here, an experienced trial judge with the opportunity to observe the witnesses and the evidence concluded that defendant was guilty beyond any reasonable doubt. This judgment was unamiously affirmed by the appellate court after careful examination of the record and arguments. There was, in shot, no shifting of the burden of proof and defendant was properly convicted of murder.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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